REMARKS

In the Office Action dated March 21, 2004, the Examiner rejects claim 3, the only pending claim, under 35 U.S.C. §102(b) as being anticipated by Smith et al., U.S. Patent No. 4,735,626 ("Smith"). Applicants respectfully traverse the rejection.

The Examiner contends that Smith discloses an air freshener unit comprising a porous high density polyethylene having a pore size of 10 to 100 microns, a void volume ratio between 30% and 55%, and a fragrance transfer rate of 46 mg per 60 minutes [46 mg/hour]. The Examiner further contends that although Smith does not disclose that the fragrance material does not leak from the wick material when the wick material is inverted, this property would be inherent. This position is based on the Examiner's contention that Smith discloses "all of the structural limitations and chemistry" of claim 3, "i.e., pore size, void volume ratio and transfer rate", and that these limitations are critical in attaining the non-leakage of the fragrance from the wick material.

However, Smith does not disclose a wick. Smith merely discloses a "porous, synthetic, polymeric support impregnated with a fragrance." Abstract, Col. 1, ll. 18-20. This support "unit" is impregnated with a fragrance oil by soaking it until no more fragrance can be absorbed without the surface of the support dripping liquid fragrance. Col. 5, ll. 37-46. The soaked unit is then packaged. Later the support "unit is removed from any packaging and is inserted into the dust collection chamber or dust bag of a vacuum cleaner." Col. 3, ll. 55-57. Thus, Smith does not disclose a device that, for example, wicks material from a reservoir, that "transport[s]" vaporizable material, or that can be replenished with fragrance oil as it releases the fragrance material to the surrounding environment. Therefore, because each and every element is not disclosed by Smith, Applicants respectfully request that the rejection under 35 U.S.C. §102(b) be withdrawn.

Applicants respectfully note that, not only does Smith not disclose a wicking device, none of the references cited by the Examiner (after three searches) disclose an air freshener wick. In fact, the references teach away from an air freshener wick, for example, by teaching a material that is soaked and packaged as described above. Applicants further assert that the air freshener wick of claim 3 is not obvious in light of any of the references cited by the Examiner.

Not only does Smith not disclose a wick, Smith also does not disclose the non-leak property of the wick. The Examiner claims that the "vaporizable material ... does not leak from the wick material when the wick material is inverted" property of the wick is inherently present in the structure that is disclosed by Smith. Applicants respectfully disagree.

The case law is clear that in a proper application of inherency, the Examiner must prove that the undisclosed performance factors must necessarily be present, and that it would be so recognized by persons of ordinary skill in the art. In re Best, 562 F.2d 1252, 1255 U.S.C.C.A.P.A. 1977; and Continental Can Co. v. Monsanto Co., 948 F.2d 1264, 1269 (Fed. Cir. 1991). It is not enough to assert that the undisclosed performance factors might, sometimes, result from the disclosed structural elements. Scaltech, Inc. v. RETEC/TETRA, L.L.C., 178 F.3d 1378 (Fed. Cir. 1999)("Inherency may not be established by probabilities or possibilities.") Smith itself appears to rebut the Examiner's inherency argument. Smith teaches that one must stop loading the 'support unit' at the point that it would drip. Col. 5, ll. 37-46. Therefore, because Smith discloses that under some conditions the material would drip, the no-drip property is not necessarily present and cannot be inherent.

Additionally, because Smith does not disclose a wick, it is logical that other properties such as the no-drip when inverted element may not be present as well. Furthermore, because Smith is not a wick, applicants note that while inversion of a wick attached to a reservoir, and the potential for such an inverted wick to leak is understood, it is unclear what inversion of the Smith 'support unit' would entail or why turning over the Smith device would make it more prone to leak.

Finally, Applicants note that the selection of the wicking material, void volume ratio, and pore size is not an arbitrary selection. This combination, as the Examiner acknowledged, is critical to achieving the 'no leak when inverted' functionality, as well as to achieving a wick that has a suitable structural rigidity. The structural rigidity facilitates press-fitting the wick into a vial containing fragrance oil (an intended application of the wick). A flimsy wick may be cumbersome or difficult to press fit into a vial. Therefore, the ranges recited in claim 3 are critical. In support of this criticality, Applicants attach hereto a declaration under 37 C.F.R. § 1.132. In that declaration one of the inventors on this application asserts that testing has

confirmed that substantially improved results are obtained from a wick made according to the claimed ranges in contrast to the results obtained using wicks with porosities outside the claimed range.

Thus, because Smith does not disclose all of the elements of claim 3, such as a wick and the no-drip property, and since the Examiner has presented no evidence that the undisclosed elements are necessarily present, the inherency doctrine is inapplicable. Applicants respectfully request that the section 102 and inherency argument be withdrawn and that claim 3 be allowed.

CONCLUSION

Therefore, the cited references do not disclose each and every element of claim 3. Accordingly, Applicants respectfully request allowance of the pending claim. The Examiner is invited to telephone the undersigned at (602) 382-6337 at the Examiner's convenience, if that would help further prosecution of the subject Application. Applicants authorize and respectfully request that any fees due be charged to Deposit Account No. 19-2814. **This statement does NOT authorize charge of the issue fee**.

Respectfully submitted,

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